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NOTES.

MONOPOLIES AND COMBINATIONS AGAINST PUBLIC POLICY.

A case recently decided in the United States Circuit Court for the Northern District of Ohio[1] presents for consideration several principles, which are of growing interest, in view of the present day anti-trust agitation.

The offending party being in this instance a telephone company, the question arose as to whether it was justified in making an exclusive lease for the period of 99 years, whereby certain local companies agreed to give all their long distance work to this particular company. In this respect it had been held that exclusive contracts in favor of express companies by a railroad were not against public policy;[2] also, that a contract whereby the Pullman Car Co. were to furnish exclusively all Pullman cars to a railroad was not in violation of

[1] *U. S. Telephone Co.* v. *Cent. Union Tel. Co. et al.*, 171 Fed. 130.

[2] *Express Cases*, 117 U. S. 1 (1885).

public policy.[3] Was an exclusive contract by a long distance telephone company to be put in any different class?

In the case of express companies the decision went upon the ground that the express business had to be carried out on passenger trains where, owing to the unavoidably limited space, and the necessity of having the agent of each express company present and in charge of the goods, it would cause endless delay and confusion, if it were necessary for a railroad to divide up such space among any and all express companies who chose to demand such accommodation. It is clear that such reasoning could not apply to a telephone company, in its endeavor to prevent local companies from using the long distance lines of competing companies.

As for the exclusive contract with the Pullman Company, it was said that who furnished the Pullman cars was of no concern to the general public, so long as they were furnished, and were allowed to be transferred over any lines in the country. It is submitted that the real distinction between both the above cases, (*i. e.,* express companies and Pullman companies) and the case of the present telephone company, is that a contract which affects only the *quality of the service*—and that not unreasonably—will not be deemed to be against public policy, whereas a contract which limits the *scope of the service,* is in violation of the duties of such companies to the public. Therefore, had the contract been to supply the telephone company exclusively with a certain kind of transmitter or receiver, it could hardly have been held an illegal or monopolistic contract, whereas had the contract of the Pullman Company been that no Pullman cars should be furnished or sent beyond certain points, it might well have violated the duties owed the public.

Another point of interest is whether or not under any view the local companies could be compelled to give their patrons long distance service if available; for if no such duty was owed the patrons, it was to be contended that no duty could be violated by entering into a voluntary contract by which the patrons were benefited. As the determination of such a question is necessarily limited to recent times, the decisions are not yet numerous, but it would seem to be solved as follows: The long distance company owed the duty of rendering long distance service to its patrons. By entering into an agreement of consolidation with the local companies, as in the present case, it assumed the duties of the local companies and *vice versa;*[4] or, as a modern text-writer has put it: "The liability

[3] *Railroad Co.* v. *Pullman Co.,* 139 U. S. 79 (1890).

[4] *Tomlinson* v. *Branch,* 15 Wall. 465 (1872); *Mobile* v. *State,* 41 So. Rep. 259 (1906).

of a consolidated company upon the contracts of its constituents is precisely the same as that of the original company."[5] Therefore, after having united with a long distance company, the local companies owed to their patrons the duty of providing them with long distance service.

Assuming, then, that it became the duty of the company to furnish to its patrons long distance service, the question remains: was the contract here entered into monopolistic and against public policy?

The contract was in the form of a 99 year lease, containing the exclusive restrictions before adverted to. It has been held that a lease may come within the provisions of a statute against "consolidation," though such a conclusion would seem to be stretching the interpretation of the word "consolidate." Accordingly, some courts have not accepted this view.[7] Under the Ohio statutes, however, the word "lease" has been specifically used, and there could be no doubt that a lease could be in violation of the public policy of Ohio. The question remained whether this particular lease was of that nature. The Court for this purpose treated the telephone company as a common carrier[8] and is supported in this view by authority[9] and many dicta, but it would seem impossible on theory to establish the essential relationship of bailor and bailee in the case of a telephone company. While it has been advanced that a telegraph company is a bailee of the message or of "intelligence,"[10] yet such reasoning can hardly apply to a telephone company, for the sender personally transfers his own message and delivers it himself, the company merely furnishing a method or means for such transportation. It could not be contended that the owner of a megaphone who offered it for public use in summoning conveyances, for example, could be liable as common carrier, and yet the case appears analogous. The better view, moreover, is that telephone and even telegraph companies are not to be correctly termed "common carriers."[11] Yet it is universally admitted that they occupy a position closely analo-

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[5] Noyes on Intercorporate Relations, p. 158.

[6] *State* v. *Atchison R. Co.*, 24 Neb. 164 (1888).

[7] *Gere* v. *N. Y. C. R. Co.*, 19 Abb. N. C. 210 (1885).

[8] P. 146.

[9] *State* v. *Cadwallader*, 87 N. E. 644 (1909); *Telegraph Co.* v. *Texas*, 105 U. S. 460 (1881).

[10] *Chesapeake* v. *Co.*, 66 Md. 399 (1886).

[11] *Leonard* v. *Tel. Co.*, 41 N. Y. 544 (1870); *Hibbard* v. *Tel. Co.*, 33 Wis. 558 (1873).

gous to that of common carriers with respect to their duties to the public.[12]

Then, reverting to the text submitted above, the lease for 99 years would here appear to be clearly against public policy, for the *scope of the service* was thereby materially limited, since the contracting company could not furnish the local companies with the connections which they could secure by supplementary contracts with other long distance companies. Such conclusion is supported by numerous authorities.[13]

The whole question arose in an unusual way, which is worthy of notice. The complainant company asked for an injunction to restrain the respondent company from interfering with this 99 year lease of complainant's, and from effecting breaches of this contract by the local companies. The relief was sought on the basis of the old doctrine of *Lumley* v. *Gye*.[14] The Court, however, held that in issuing an injunction to prevent a breach of contract, it necessarily devolved upon the Court to inquire into the legality of the contract which was to be thus negatively enforced. Then, turning the tables on the complainant, they held that it had made a contract in violation of public policy and statute law, and was therefore entitled to no relief on such contract.

The whole matter being an equitable proceeding the Court was entitled to look both at the respondent's wrong, and at the standing of the complainant, and it was justified in refusing aid not only for the reason just given above, but on account of the old equitable maxim that "he who comes into equity must come with clean hands." This was a case, therefore, when the "tu quoque" argument proved wholly effective.

W. L. MacC.

Action for Libel Where Defendant Has Used a Fictitious Name.

A curious and unusual set of facts has recently presented to the King's Bench Division a perplexing question in the law of Libel.[1]

The *Sunday Chronicle* published a letter from its Paris correspondent describing a motor festival at Dieppe. In this

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[12] Hutchinson on Carriers, § 81a.

[13] *State* v. *Tel. Co.*, 47 Fed. 633 (1891); *Munn* v. *Illinois*, 94 U. S. 113 (1876); *Ohio* v. *Tel. Co.*, 36 Ohio, 296 (1880).

[14] 75 Eng. C. L. R. 216 (1853).

[1] *Jones* v. *Hulton*, L. R. (1909), ii K. B. D. 444.